



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Michael Varker

v

Victoria Police

(U2021/1816)

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 17 MAY 2023

Application for an unfair dismissal remedy – dismissal not unfair – application for an unfair dismissal remedy dismissed.

Introduction and overview

[1] Immediately before his dismissal on 15 February 2021, Michael Varker was employed by Victoria Police as a Senior Police Custody Officer. Mr Varker commenced that employment in May 2016. The Applicant also had a lengthy period of previous service when he was employed by Victoria Police from late 1980 to around 1996. He was also an Australian Federal Police employee for several years before recommencing with Victoria Police.¹

[2] For the reasons explained in *Varker v Victoria Police*² Mr Varker's employment with Victoria Police ended on 15 February 2021 when he received a letter of termination dated 8 February 2021, which had earlier been sent to Ms Megan Wenlock of the Community and Public Sector Union, who at that time had been representing Mr Varker in connection with allegations of misconduct. On 4 March 2021 Mr Varker applied under s 394 of the *Fair Work Act 2009* (Act) for an unfair dismissal remedy alleging that his dismissal was unfair.

[3] Mr Varker's duties as a Senior Police Custody Officer included supervising the activities of other Police Custody Officers and when necessary, assisting these officers in the performance of their duties, and coordinating the safe processing and transfer of persons in custody to and from Court.³ By letter dated 27 August 2020, Mr Varker was informed that Victoria Police had received a civilian complaint indicating that he may have engaged in misconduct, he was suspended from duty and an investigation into the alleged misconduct would commence.⁴ The substance of the complaint alleged that Mr Varker had used excessive force towards the complainant whilst in custody in the Geelong Police Station on 25 August 2020.

[4] By letter dated 15 September 2020, Victoria Police informed Mr Varker of the particulars of three allegations of misconduct. In summary, the three allegations were that Mr Varker breached:

- the standards that applied to his employment, including but not limited to the Code of Conduct for Victorian Public Sector Employees of Special Bodies (Code),

Victoria Police Manual (VPM) Professional and Ethical Standards, VPM Operational Safety and Use of Force, VPM Police Custody Officers, VPM Persons in Police Care or Custody and/or the Enterprise Agreement by using an inappropriate and/or excessive and/or disproportionate level of force in carrying out his duties as a Supervising Police Custody Officer (SPCO) (Allegation 1);

- the standards that applied to his employment, including but not limited to the Code, VPM Professional and Ethical Standards, VPM OHS Fundamental Obligations, VPM Persons in Police Care or Custody, VPM Police Custody Officers and/or the Agreement by failing to take reasonable care for the health and safety, and the security and welfare of a person who may have been affected by Mr Varker's acts or omissions in the workplace, who in this case was a person in custody (Allegation 2); and
- the standards that applied to his employment, including but not limited to the Code, VPM Professional and Ethical Standards, VPM Uniform and Appearance Standards and/or the Agreement by wearing an inappropriate face covering while carrying out his duties as an SPCO (Allegation 3).⁵

[5] The first two allegations relate to an incident on 25 August 2020 involving a person in custody, and to whom I will refer as Person X.

[6] On 16 September 2020, Victoria Police engaged Mr Duncan Chisholm of Counsel to conduct an investigation into the allegations.⁶ Mr Varker did not engage with Mr Chisholm or participate in any interview related to the investigation - although he was given an opportunity – contending he was unfit to do so.⁷ On 9 October 2020, Mr Varker provided his written response, denying the allegations,⁸ to Victoria Police.⁹ Mr Chisholm provided an investigation report to Victoria Police on 17 December 2020 in which he concluded that all but one of the particularised allegations were substantiated or partially substantiated.¹⁰ On 12 January 2021, Victoria Police wrote to Mr Varker communicating the findings of the investigation.¹¹ Mr Varker was notified, in substance, that each of the allegations had been substantiated, that Victoria Police proposed to terminate his employment and that he had an opportunity to respond to the findings and the proposed disciplinary outcome within 10 days.¹²

[7] After some further exchanges¹³ Mr Varker responded by correspondence of 27 January 2021¹⁴ in which he complained about several procedural deficiencies in the investigation process, contended that dismissal would be grossly disproportionate, and set out a series of matters as mitigating considerations.¹⁵ On 8 February 2021, Victoria Police provided Mr Varker's union representative with a letter terminating Mr Varker's employment with effect from the date on which he received the letter.¹⁶ Mr Varker received the letter on 15 February 2021, and his dismissal took effect as at that day.¹⁷

[8] Victoria Police now also rely on certain conduct in which Mr Varker is alleged to have engaged and which is said to have been discovered after Mr Varker's dismissal - on 18 July 2022 and 25 July 2022.¹⁸ The first concerns an incident on 23 June 2020, captured on a closed-circuit television (CCTV) camera, during which Victoria Police contend Mr Varker used excessive force on a person in custody. I will refer to that person as Person Y (Allegation 4).

The second concerns allegations that Mr Varker made several concerning and inappropriate Facebook posts during the course of his employment (Allegation 5). This conduct, which was discovered post dismissal, is said to be significantly serious and to provide a valid reason for dismissal.

[9] It is uncontroversial that Mr Varker, in his employment as a Senior Police Custody Officer, was required to comply with the VPM, which includes the VPM Professional and Ethical Standards.¹⁹ The VPM Professional and Ethical Standards required Mr Varker to conduct himself in a manner that protects his reputation and the reputation of Victoria Police and to take responsibility for and be prepared to account for his decisions and actions.²⁰ It is also not controversial that a Police Custody Officer may, where necessary, use reasonable force to compel a person the officer is managing, transporting, or supervising to obey an order given by the officer in the exercise of the officer's functions or powers.

[10] I have decided that the dismissal of Mr Varker from his employment with Victoria Police was not unfair and so his application should be dismissed. My reasons follow.

25 August 2020 incident involving Person X – Allegations 1 and 2

[11] Allegations 1 and 2 may be considered together. Once the excess verbiage in the allegations is put to one side, the substance of the allegations is that Mr Varker engaged in misconduct on 25 August 2020 because he used unreasonable force against Person X in the cells at the Geelong Police Station and he failed to render assistance to Person X in the cells. The incident the subject of these allegations occurred while Person X was being processed by Mr Varker and his team of Police Custody Officers. The incident was captured on CCTV, the footage of which is in evidence. There is no sound.

[12] Mr Varker does not contest that he used force in his dealings with Person X²¹ but disputes that the force used was excessive or disproportionate in the circumstances. Mr Varker maintains that the force he used was necessary to progress the processing of Person X in a manner that was safe to himself and his colleagues, and to avoid any dangerous escalation in the situation.²²

[13] The circumstances which are said render the force used to be within permissible bounds may be distilled to two broad matters.

[14] *First*, Mr Varker says he was concerned that Person X:

- (i) would become physically violent or aggressive, including suddenly and without advance notice;
- (ii) would spit saliva or blood on him or his colleagues;
- (iii) would bite him or his colleagues.²³

[15] *Second*, Mr Varker says his concerns were heightened because:

- (i) he had seen that Person X had bitten their mouth and drawn blood, and had spat blood on the wall;
- (ii) he understood that Person X was Hepatitis C positive;
- (iii) Person X was swearing at him and his colleagues;

- (iv) Person X was behaving in a physically agitated manner;
- (v) Person X had refused to comply with reasonable directions from custody staff, including to remove their bracelet;
- (vi) Person X was a 'Sovereign Citizen', which he understood inclined Person X towards denying his and his colleagues' authority to maintain order at the Station;
- (vii) Person X was known to him to be an ICE user and appeared to be under the influence of ICE or another substance on 25 August 2020.²⁴

[16] In sum, Mr Varker contends that each factor identified above provides an important context for the way the 25 August 2020 incident must be viewed and, the history of aggressive and volatile behaviour of Person X in custody is a relevant consideration in assessing whether the application of force was reasonable or appropriate.²⁵ Person X's record of behaviour while in custody is in evidence²⁶ but it is not recited here and the record is the subject of a confidentiality order.²⁷ It is sufficient to observe that the description - a history of aggressive and volatile behaviour in custody - is apt.

[17] Before turning to the detail of the incident involving Person X, it is necessary to make some observations about aspects of Mr Varker's evidence. Mr Varker is certified by State and Federal Police as a defensive tactics instructor, who has taught tactical training to law enforcement members.²⁸ He is also qualified in many different martial arts systems.²⁹ Mr Varker said that when he was first training as a Senior Police Custody Officer at the police academy in 2016, the instructors there did not know what defensive tactic restraint methods to teach and that there were no approved techniques or training packages. Instead, he said that there were discussions and scenario training on appropriate techniques to be used, including when a person in custody was a threat of biting and/or spitting. He said that head control was regularly discussed as an appropriate method in such a fluid and dynamic situation. Head control is considered to be a fluid form of restraint, in the sense that it is a control mechanism to be used where considered the most appropriate means of safely defending yourself and others and controlling a person during a physical confrontation. He said that the method of head control by using the hair is regarded as the most effective and safest way to control a person in these circumstances, whilst causing the least amount or no damage to the neck and spine and very little pain.³⁰

[18] Mr Varker called no expert to verify or corroborate his evidence about the use of head control and the use of hair in that regard. Senior Sergeant Matthew Hargreaves, has responsibility for the state-wide standardisation, co-ordination and management of operational safety and tactics training for all operational members of Victoria Police as well as the training of suitably qualified personnel as instructors.³¹ He is also a qualified defensive tactics instructor.³² Senior Sergeant Hargreaves gave detailed evidence about the training that Police Custody Officers received when they commence employment and the Defensive Tactics Manual that underpins the training and the retraining received by Police Custody Officers and Senior Police Custody Officers during the biannual operational safety and tactics training.³³ These materials are also available on the Victoria Police Learning HUB.³⁴

[19] Senior Sergeant Hargreaves also gave evidence about the lesson plans used during the foundations training undertaken by Mr Varker in 2016³⁵ and he produced a copy of the version of the Defensive Tactics Manual in place at the time Mr Varker completed the Police Custody

Officer foundations training in July 2016, which he said, and I accept is substantively similar to the 2019 Defensive Tactics Manual.³⁶

[20] Senior Sergeant Hargreaves also said that Mr Varker completed operational safety and tactics training biannual programs on 16 May 2017, 13 September 2017, 16 February 2018, 14 September 2018, 12 April 2019, 18 October 2019 and 15 April 2020.³⁷ He said that the operational safety and tactics training program that Mr Varker attended in April 2020 covered mental health awareness and engagement, effective communications framework (including the HEAR principle – Help, Empathy, Active Listening and Rapport), risk identification, searching and defensive tactics.³⁸ A session plan was also produced.³⁹

[21] The stated purpose of defensive tactics training is to develop skills and knowledge in police members, Protective Services Officers and Police Custody Officers that will enable them to: avoid physical conflict; resolve physical conflict; defend themselves and others against attack; and act in accordance with both statutory and departmental requirements.⁴⁰ The Defensive Tactics Manual in operation when Mr Varker commenced employment, as well as the 2019 iteration, emphasised avoiding physical conflict, stating:

“Physical conflict can be avoided in most situations. The skills and attributes that enable members to avoid physical confrontations include:

Adopting the appropriate attitude

Being able to identify risks

Being able to make appropriate decisions

Being able to use communication techniques

Being willing to withdraw, cordon, contain and negotiate.”⁴¹

[22] The two iterations of the Defensive Tactics Manual also set out operational (safety) response principles emphasising safety and harm minimisation,⁴² risk assessment and evaluation⁴³ and the avoidance of confrontation and use of force.⁴⁴

[23] Mr Varker’s evidence about his knowledge of the Defensive Tactics Manual was unsatisfactory. During cross examination a proposition was put to Mr Varker that training in defensive tactics was administered in accordance with the Defensive Tactics Manual in place in 2016.⁴⁵ Mr Varker said in response “[t]here was no manual. They didn’t have a manual back then and they didn’t know what to teach us.”⁴⁶ He also said that he had no awareness of either iteration of the Defensive Tactics Manual.⁴⁷

[24] This is rather at odds with his earlier reply statement in which he says:

“I don’t agree with Mr Hargreaves’s comments. The Defensive Tactics Manual which is annexed to the Hargreaves Statement at MH-1 explicitly endorses the grabbing of hair as a method of head control. I was familiar with the Defensive Tactics Manual throughout my employment and it was available to me on the intranet.”⁴⁸ [Underlining added]

[25] Later he gave the following responses to questions from me:

THE DEPUTY PRESIDENT: *Yes, all right. Whilst that's being set out, Mr Varker, did I understand your evidence earlier that the Defensive Tactics Manual is designed for operational police officers rather than police custody officers? -It is, sir, and right through their lesson plans it mentions 'police' and 'protective service officers.' It mentions no police custody officers whatsoever.*

Can I just get you to have a look at the Defensive Tactics Manual, which is behind MH1 to Mr Hargreaves' statement? So, that's tab 6 and the first sub-tab behind that. It begins at 217 of the court book? -Yes, sir.

If you turn to page 222? -222?

Yes, and you'll see there the introduction heading of this heading? -Yes.

And then it states the purpose, 'to develop skills,' et cetera, of a range of people? -Yes.

And then there's a reference to 'and police custody officers?'---Well, I don't understand what that means. It's not in the Defensive Tactics Manual.

I'm sorry? -Sir, like I said, I've never seen anything with 'police custody officer' in any way in any Defensive Tactics Manual.

This is said to be a Defensive Tactics Manual. You'll see that from page 217? -Yes, I've never seen this.

So, is it fair to say that your earlier evidence should be understood as meaning that you've never seen a manual which mentions 'police custody officers' - - -? -No, I haven't.

- - - rather than you have direct knowledge that police custody officers are not included in the manual? -All I can say, there is no manual for police custody officers, sir.

*A separate manual? -No, there's no manual for it.*⁴⁹ [Underlining added]

[26] Earlier Mr Varker had given evidence during a cross-examination exchange with Counsel for Victoria Police which was to the effect that the Defensive Tactics Manual and other manuals and the lesson plans of training delivered to Mr Varker produced by Acting Inspector Hargreaves were possibly fabricated. Relevantly the exchange was as follows:

MR MINUCCI: *Okay. So, Mr Varker, then could I get you then please to turn to exhibit MH17? -MH?*

MH17 which begins at page – court book page page 604. Have you got that in front of you? -Yes. MH17. Which page?

604. Now you said in your evidence a moment ago that there was no Defensive Tactics Manual in place at the time that you commenced your training. Do you recall that

evidence?

---Yes, that's correct.

If I get you to go to the bottom of page 604 you will see there at the bottom of the page in Version 4.0 updated December 2015. So that was well and truly before you commenced your training wasn't it? -604, yes.

Yes. At the bottom of the page. So you have got Defensive Tactics Manual. You go to the bottom of the page Version 4.0? -Yes.

Updated 12 – which is December 2015 – that was, in fact, the manual in place at December 2015, isn't it? -I don't know. I wasn't shown it or told it until I did my course. I know the instructor said, 'We don't have a package.'

We'll come to that in due course. We'll come to that in due course. Now, I just want to agree before we come to that and I should run through this relatively quickly. You agree that you are required or were required to comply with the VPM Persons and Custody Manual? -Yes.

The VPM Police Custody Officer's Manual? -Yes.

The VPM Operational Safety and the Use of Force Manual? -well, there wasn't one.

Okay? -There wasn't one for the – all those custody officers. There was no training manual at all. And I specifically remember the instructors on course saying, 'We don't have a package. We're going to wing this. We don't have anything to go off.'

Well, we might just go to that now actually and I will come back to what I was going to do. Now, you accept that you completed your training in 2016? -Yes.

And that was on the 15 July 2016? -I believe so, yes.

Okay. So you started your training eight weeks prior. So that would mean you started your training on the 15 May 2016? -Yes.

So now if I could get you please to go to exhibit MH11 to Mr Hargreaves statement which is at court book page 542 or it begins at 541 and then goes to 542? -Yes.

Okay? Now, that document there – if you go down to 542
- - -? -Yes.

That there is a lesson plan or a syllabus plan for your training that applied as at 15 July 2016? -Is it? I've never seen it.

Okay. If you go to the bottom of the page you will see the version control at the bottom of the page identifies that it's from 2016 but you don't accept that? -No. I don't. Those things can be changed – those dates.

Sorry. So you're saying that when the Victoria Police has doctored the dates of the manual and you're suggesting that - - -? -Possibly. Yes. It's possible.

And you're suggesting that Mr Hargreaves is making up that these were the syllabus in place at the time that you had conducted your training? -I could say that, yes.

So that's your evidence? -Yes.

He's made it up? -Yes.

Okay.

THE DEPUTY PRESIDENT: *Sorry, Mr Minucci, you might need to get some instructions about this but the date? Is that the date at the bottom? 18th of the 14th?*

MR MINUCCI: *Yes, I have just noticed that Deputy President. Now, in terms of – so I just want to just clarify this just for a moment. And forgive me if – sorry, I withdraw that. Sorry, sir. Does my learned friend have a problem?*

MR MILLAR: *No. No, I am just noting the fact that the Gregorian calendar only has 12 months.*

MR MINUCCI: *Now, Mr Varker, I just want to be clear about your evidence. It's your evidence that Mr Hargreaves has made up or invented these documents and is lying about the fact that they were in place at the time that you trained as a PCO? -I'm saying I've never seen these documents and they never ran off lesson plans in our DTs. And the instructors winged it. They never brought anything into the classrooms. They never had any documents at all whatsoever in our training and I have got a lot of knowledge about this industry and these tactics.*

Okay? *-And defensive tactics.*

Well let's go to exhibit MH12 because I think we can deal with this – my learned friend's objection to the Gregorian calendar pretty quickly. If I get you to go to MH12 please? That's court book page 548 and you then go to court book page 549? -Yes.

I suggest there that that that is also a syllabus that was in place at the time that you conducted your training and that would be clear to you because at the bottom of the page there is the date marked the 18 April 2016? -That means nothing to me. I can't comment on it but I know that these weren't in existence when I did my course.

Well, I am suggesting to you that they were? -Well, I'm telling you they're not.

Okay? -I could suggest probably there's a lot of cut and pasting on here from documents that I haven't seen. Never seen them.

THE DEPUTY PRESIDENT: *Well, Mr Varker, the documents appear to be a lesson plan. Yes? -I couldn't have a lesson plan, sir, because they didn't have a package for - - -*

Well, just don't anticipate what I am going to ask you next. A lesson plan used by the person delivering the lesson? -Yes.

So that you may have not seen them doesn't mean that they weren't in existence, does it? -Well, I can only say they possibly were then.

Yes. But a lesson plan is used by the person delivering the plan? -Yes.

So the person delivering the plan may have had the plan? -But when they deliver the plan they read it to you. They actually have a document in their hand and they run through the overview of what the lesson is going to undertake and I have never seen that happen. It never happened on my course. And I know that the Police Custody Office Program they'd hire the person to read – to actually write the Defensive Tactics Package for the Police Custody Officers. And I was part of the program there that assisted that person to do it.⁵⁰ [Underlining added]

[27] This very much appears to me to be a recent invention. I do not accept Mr Varker's evidence, which at best is a theory without substance formulated on the run and which does him no credit. Mr Varker's reply statement engages with both the Defence Tactics Manual (at [6]) and the lesson plans (at [8]) and nowhere does he say the documents are fabricated.⁵¹ To the contrary, as earlier noted he says he was familiar with the Defensive Tactics Manual throughout his employment, and it was available to him on the intranet and that it endorses the grabbing of hair as a method of head control. The Defence Tactics Manual which Mr Varker says in his reply statement "is annexed to the Hargreaves Statement at MH-1" in relation to which he notes (by way of support for his position) "explicitly endorses the grabbing of hair as a method of head control" also explicitly refers to Police Custody Officers. The Defence Tactics Manual notes that "[t]he purpose of defensive tactics training is to develop skills and knowledge in police members, protective services officers and police custody officers . . .".⁵²

[28] The Defence Tactics Manual also provides that "[t]hroughout this document the term 'police members' or 'members' is used as a colloquial reference to describe not only sworn police personal (sic), but also includes protective services officers and police custody officers."⁵³

[29] The iteration of the Defence Tactics Manual applying when Mr Varker undertook his training in 2016 contains the same text reproduced at [27] and [28] above.⁵⁴

[30] Mr Varker also gave the following evidence recorded in the transcript:

MR MINUCCI: So that there is the manual that applied as at 2019. Do you accept that? -Maybe – yes.

Do you accept that or not? -No, I don't accept it. I haven't seen it.

Okay. Have you got it in front of you? -I have.

So that's the Defensive Tactics Manual of 2019. I suggest to you that that document applied as at 2019? -I can't answer that 'yes' or 'no'.

Okay. Go to - - -

THE DEPUTY PRESIDENT: Sorry – Mr Varker these materials were served on your solicitors or your former solicitors by the respondent as required by my directions? -Yes.

They were presumably – they were sent on to you, were they? -I think so, sir. But I haven't read them.

*I see.*⁵⁵ [Underlining added]

[31] Again, this evidence is both contrary to his evidence that he was familiar with the Defensive Tactics Manual throughout his employment and his earlier engagement in his reply statement with the very material⁵⁶ he later says under oath he had not read.

[32] I also agree with Victoria Police that Mr Varker was a poor witness. The analysis above suggests, viewed from the kindest of perspectives, that he was inconsistent in his evidence and prone to embellishment. He was also argumentative, and repeatedly refused to answer questions directly.⁵⁷ His accusation that Senior Sergeant Hargreaves may have fabricated the content of the training manuals exhibited to his statement was, as Victoria Police contend, a ridiculous display. My assessment of Senior Sergeant Hargreaves as a witness, is that by contrast to Mr Varker, he gave clear responses to the questions asked of him and he was not prone to embellishment. Except where I otherwise expressly indicate, I accept his evidence in preference to that of Mr Varker where there is a conflict. I also accept the evidence of Victoria Police witnesses where that evidence was unchallenged save as indicated later in this decision.

[33] I should add one further matter before turning to the incident the subject of the first two allegations. I accept that both iterations of the Defensive Tactics Manual discuss grabbing or holding hair in the context of a rear or front takedown manoeuvre.⁵⁸ Mr Varker seems to attach some significance to this fact⁵⁹ – perhaps as vindication for some of the conduct to which I will shortly come. But the fact that he may have been trained in head control as a method of defensive tactic (or whether that included hair grabbing or holding) is no answer to the question of whether deploying that method in a particular circumstance was reasonable or appropriate. Put another way – it is no answer to an allegation that pulling the hair of Person X, or any other application of force was not a reasonable use of force, nor appropriate in the particular circumstance, simply because Mr Varker had been trained in a method of head control or any other defensive tactical method and he had the opportunity to deploy the method. The focus will always be (as it should be) on whether the application of force was reasonable, not whether there was training in the method of force applied. And in any event, as will shortly be apparent, there was nothing in Mr Varker's takedown of Person X from the chair in which Person X was seated which could be described as defensive. It was an offensive manoeuvre which Mr Varker deployed.

[34] As earlier noted, the incident the subject of the first two allegations is captured on CCTV footage. On 25 August 2020, Mr Varker was on duty at the Geelong Police Station. Person X attended the Geelong Police Station voluntarily and was arrested following an alleged shop theft and was assisting Victoria Police with inquiries. Person X was placed into custody in the cells at the Geelong Police Station.

[35] At about 1:00 pm (0:06 on the footage) Person X enters a room known as the iFace room. Person X is handcuffed and wearing a surgical face mask. Two male custody officers and a female custody officer enter the room behind Person X who stands in an area marked with yellow and black stripes in the shape of a square. Mr Varker is not among these officers. Person X initially appears calm, cooperative and to be complying with instructions. At about 1:59 on the footage, Person X has removed the face mask and stands in the middle of the square

appearing to follow the instructions of the female officer. At 2:24 Person X sits in a chair adjacent the square floor marking, again appearing to follow the direction of the female officer. Thereafter Person X appears to engage with various officers while remaining seated. During this period Person X can be observed swinging legs, which Senior Sergeant Hargreaves described as “engaging in potential stimming”, and something one would factor into a risk assessment when communicating with Person X.⁶⁰ Senior Sergeant Hargreaves said that the observed behaviour could be representative of a spectrum disorder or another mental health condition.⁶¹

[36] At 5:02 a male officer begins removing the handcuffs from Person X. Thereafter Person X permits a physical examination of their hands and allows a female officer to remove rings. But not all the rings are able to be removed. Two rings appear to have been left on Person X’s right hand fingers. This is much clearer at 7:40-7:45. At 7:30 a female officer attempts to remove a green bracelet from the right wrist of Person X. From about 7:35 Person X becomes animated, and the female officer leaves the room. Person X appears calm by 7:49, although some leg swinging occurs. There was no reaction from any other officers in the room and Senior Sergeant Hargreaves said that the absence of any such reaction at this time suggested Person X had not shown any pre-attack indicators or signs of aggression.⁶² Person X was otherwise seated, calm and not exhibiting any signs of aggression.

[37] At about 8:05, Mr Varker enters the room, apparently because Person X was refusing to remove the green bracelet. Mr Varker’s evidence was that:

“Generally, I will not assist in the processing of a prisoner as this is a task normally completed by the other PCOs. Generally, I am called on to assist when a prisoner is being defiant or refusing to be processed. As PCO Bruce had said to me that [Person X] was refusing to remove [their] bracelet, and as the removal of the bracelet was a necessary step in processing [Person X] for reasons I have already explained, I re-entered the iFace room in order to assist in [Person X’s] processing. This was the only reason for which I re-entered.

Upon entering the iFace room, I could see that the bracelet was made of a thick, hard, glass-type plastic material. I have seen similar pieces of jewellery before, and am aware that there is a potential safety risk if the bracelet is shattered. If it was shattered it could produce sharp, shard-like pieces. I am aware of prisoners using similar shards to self-harm, by using the sharp shards to slash their wrists or even swallowing the sharp shards (which is one of our highest custody risks). I am also aware that those shards could also be used to cause harm to the PCOs in the prisoner’s vicinity, or to other prisoners.

I pointed to the green bracelet on [Person X’s] wrist and told [Person X] that the bracelet had to come off for safety reasons. [Person X] made clear [Person X] did not intend to take the bracelet off and responded by saying “no, I’m fucking not you dog”.

At no point did [Person X] state to me or my colleagues that the bracelet was too tight and that this was the reason [Person X] could not remove it. To the contrary, [Person X] deliberately made it harder for us to remove the bracelet by clenching [their] fist so that it could not be manoeuvred off [their] hand easily. I asked [Person X] at least six times to open [their] fist so that the bracelet could be removed, as did others in the room.”⁶³

[38] There is no indication on the footage that Person X made a fist to prevent the female officer from removing the bracelet before Mr Varker entered the room. As with the two rings left in situ by the female officer, it appears that the bracelet could not easily be manoeuvred over Person X's wrist and hand. The resistance, by making a fist does not occur until after Person X is on the floor.

[39] Senior Sergeant Hargreaves said that on his observation of the footage Mr Varker enters the room displaying a high level of agitation, demonstrated by his fists being clenched and pointing directly at Person X.⁶⁴ Save that I observe Mr Varker's right-hand clenching into a fist (rather than both hands) I agree with Senior Sergeant Hargreaves' observation. Mr Varker does not examine Person X's wrist and hand nor the bracelet. Instead Mr Varker removed a canister of Mk9 OC spray from his thigh holster, he says to check the pin with his fingers to confirm that it could be removed if required.⁶⁵ Mr Varker holds the canister in his right hand at his side, which he says was to ensure it was accessible in the event that this was required to subdue Person X if Person X became violent.⁶⁶ Victoria Police contends that Mr Varker's removal of the Mk9 OC spray and pointing it towards Person X was contrary to Mr Varker's training⁶⁷ and was intended to be threatening. On my review of the CCTV footage, I do not consider Mr Varker pointed the Mk9 OC spray towards Person X. From 8:11 to 8:22 Mr Varker removes the Mk9 OC from the holster, fiddles with the pin, holds the Mk9 OC spray by his side before returning it to the holster. This is all consistent with Mr Varker's evidence. At no stage does he point the Mk9 OC spray towards Person X. The Mk9 OC spray may have been removed to intimidate, or for the purpose described by Mr Varker. There is an insufficiency of evidence to attribute an improper motive to Mr Varker. But that which is clear is that the allegation of pointing the Mk9 OC spray towards Person X cannot be made out.

[40] That which happens next from approximately 8:24, is nothing short of brutal. Mr Varker's evidence was that he responded with words to the effect of 'if you don't take it off, you will leave us with no option but to use force to remove it from you'. He says Person X responded, '[f]ucking go ahead'.⁶⁸ He said he considered Person X was escalating the situation and was going to assault or spit at him or his colleagues and he felt he needed to protect himself and his colleagues.⁶⁹

[41] Mr Varker's evidence was that Person X was in an aggravated state and had potential to escalate and injure either themselves or one of the officers, and so he decided to restrain Person X, which involved taking Person X to the ground.⁷⁰ The footage bears out that both he and Person X were agitated, but no more. Person X is otherwise seated, and a surgical mask covers their nose and mouth. Person X makes no motion to remove the mask and Person X's hands remain resting on Person X's lap. Apart from the verbal exchange, there does not appear to be any other basis for Mr Varker's apprehension that Person X was going to spit on him or his colleagues or otherwise embark upon an assault.

[42] That which I observe during the short period between the time Mr Varker entered and 8:24 is an apparent heightened exchange, some may say heated. At 8:24 Mr Varker moves towards Person X, who is seated with their hands on their lap, and grabs Person X's left arm with his right hand and a handful of Person X's hair with his left hand, pulling the hair to the left and dislodging Person X in a yanking motion from the chair in which Person X was seated.

[43] Mr Varker's evidence was that he manoeuvred Person X to the ground so that Person X was in a sitting position.⁷¹ Based on my observations of the footage Mr Varker did no such thing and I do not accept his evidence. What is visible to me is the violent grabbing of the hair of Person X, yanking to dislodge Person X from the chair and then dragging Person X by the hair across the floor.

[44] When Person X is on the floor, the footage clearly shows that Mr Varker takes hold of the hair of Person X with both hands and appears to drag Person X by the hair towards the square marked floor area while another male officer moves in to restrain Person X's legs. Mr Varker appears at one point to use the hair as a lever to shake the head of Person X. Mr Varker says he shook the head to get Person X to focus attention on him.⁷² If that was his intention other less violent means ought to have been deployed. The force used by Mr Varker in that instance was not reasonable. Efforts are then made by Mr Varker and other officers to manoeuvre Person X's arms behind their back in order that handcuffs may be applied, and all the while Mr Varker continues holding and pulling Person X's hair. At 9:24 there are five male officers on top of or hovering above Person X, with Mr Varker still holding or pulling Person X's hair. Handcuffs are applied and the bracelet is eventually removed with the assistance of the female officer, the application of some lubricant, and the many hands of other male officers still on top of Person X. When removed it is tossed on the floor at which point a small shard breaks off the bracelet.

[45] I accept that once Person X was on the floor, there is evident resistance by Person X to having the bracelet removed and allowing their arms to be moved to their back, so their hands could be handcuffed. But I do not accept that the assault upon Person X by Mr Varker described above (which preceded the resistance) was justified nor was it a reasonable application of force.

[46] This is not a contest about Person X's right to keep the bracelet. I accept that the bracelet had the potential to cause harm to a person in custody and to others and that Person X was required to remove it. This is a contest about whether the force applied was reasonable in the circumstances, in order to remove the bracelet then and there in the manner deployed. The rings on Person X's right hand which were not able to be removed, as earlier noted, do not appear to have subsequently been removed, although they would also present a safety concern.

[47] Person X did not appear to be a physical threat to Mr Varker or anyone else before Mr Varker moved in to bring a seated Person X violently to the ground. Moreover, there was no possible head control justification in dragging Person X across the floor by the hair. That was pulling the hair, no part of which involved head control as described by Mr Varker in his evidence. In addition, with three other male officers restraining Person X (who was on the ground face down), with their hands and body weight, the need to maintain a grip of Person X's hair – as Mr Varker does – frankly escapes me. Most telling of the circumstances is that Mr Varker did not say that he directed or requested Person X to move out of the chair and to lay down on the ground before he moved in on Person X and forced them down. Also telling is that with all of the subordinate officers present, Mr Varker did not direct other officers to bring Person X to the ground. The visual of the incident has all the hallmarks of a man angered by what is likely to have been - to use the vernacular – a spray of abuse from Person X, then getting angry and reacting with violence – not reasonable force. As Senior Sergeant Hargreaves correctly points out in his evidence, there are four male officers exerting force on Person X and three other personnel within proximity. The circumstances did not justify Mr Varker's

application of force to Person X while Person X was on the floor already being restrained by three other male officers.⁷³

[48] Mr Varker's stated objective was to remove a bracelet from Person X who had hitherto (at least as concerns the hand inspection and ring removal) been compliant. Senior Sergeant Hargreaves said that he did not consider the bracelet posed a risk to the good order or security of the gaol, or a risk to Person X. He said that other measures could have been put in place to mitigate the risk of the bracelet and, in circumstances where no pre-attack indicators or behavioural issues are observed, the use of force and unapproved techniques was disproportionate and unjustified. Senior Sergeant Hargreaves said that Mr Varker should have considered other options to remove the bracelet which were less violent in approach noting that the bracelet was later able to be removed using lubricant.⁷⁴ I agree. In my view the grabbing of Person X's hair as a means of dislodging Person X from the chair and to the ground was inappropriate. It was grossly disproportionate to any perceived threat, and it was not a reasonable response to the reluctance by Person X to have the bracelet removed. The same assessment is made about Mr Varker dragging Person X by the hair when Person X was brought to ground, and continuing to hold Person X by the hair for a significant period before the bracelet is ultimately removed.

[49] From 9:16 to 9:31, the footage shows Mr Varker's right knee across the right hand side head and neck area of Person X. Towards the end of this period Mr Varker is applying pressure with the knee as is evident from the leveraging position of his left leg. Mr Varker admits as much. His evidence was that:

"I saw that the handcuffs had been placed on[Person X]. All that had to be done now was that they had to be fitted and locked. I prepared to stand up, because once the handcuffs had been locked the risk was negated and we no longer needed to use our bodies to restrain [Person X]. I shifted my weight and position by bringing my right knee off the ground and putting it onto the side of [Person X's]face or back of [their] head, and bringing my left leg in so that most of my weight was being borne by my right foot and left foot. This minimised any pressure on [Person X's] face from my right knee, and ensured that my centre of gravity could shift backwards away from [Person X]."⁷⁵

[50] The corollary of course is that there would be no need for an elaborate explanation of weight shifting, if weight was not first applied. Moreover, I do not accept Mr Varker's evidence that shortly after 9:10 Person X was attempting to turn their head to the right and he felt that the grip of his right hand was not sufficient to prevent [Person X] from doing so, so Mr Varker moved his left hand to grip Person X's hair in order to re-establish his hold on Person X. I do not accept that his right knee remained behind the neck and shoulder and was not on the neck.⁷⁶ From about 8:28 until Person X is later secured in handcuffs, Mr Varker has hold of Person X's hair, with force of either his left or right hand or with both hands. At 9:21 the footage clearly shows Mr Varker's knee being moved with force down upon the side head and neck of Person X. Earlier, at about 9:00 Mr Varker's right knee is clearly positioned across the head and neck area of Person X and his left leg is being used as leverage. All the while three other male officers are holding Person X down on the floor and attempting to secure handcuffs. During this time and until the handcuffs are applied, the officers restrain and control Person X's hands and arms. If, as Mr Varker said in his evidence - "once the handcuffs had been locked the risk was negated" - I ask rhetorically why, when Person X's hands and arms were restrained and

controlled by means other than the handcuffs, was it necessary that he continue to hold the hair and use his knee across the head and neck region of Person X? It was not. The handcuffs controlled and restrained the hands and arms of Person X. Before the handcuffs were applied, other officers had control of Person X's arms and legs. In both cases Person X's hands and arms were controlled – and the risk was negated. The application of force with his knee as described above in the circumstances was an unreasonable application of force. As I had earlier observed there was no apparent need to be grabbing Person X's hair once other officers intervened, much less to apply further force with the use of Mr Varker's right knee.

[51] I consider the application of force by Mr Varker depicted in the footage and summarised above to be unreasonable in the circumstances. Person X did not fail to comply with any direction, at least not initially – the problem with the removal of the bracelet occurred because it could not easily be removed. But Mr Varker did not make any attempts to de-escalate the situation. The application of force was not responsive to an attack or any other kind of physical provocation by Person X, and such verbal provocation through the use of foul-mouthed language as likely emanated from Person X does not justify the violent physical response captured by the CCTV camera depicted in the footage. Mr Varker did not show any willingness to withdraw, cordon, contain and negotiate which is evident by the brief time period which passes between his appearance in the iFace room and the violent takedown of Person X. It is also evident that in that short period between entering the iFace room and moving in to take down Person X, Mr Varker could not properly have made a risk assessment much less identified alternatives to mitigate such risks posed by the bracelet. Mr Varker's aggressive stance on entry to the room and the short period between entry and action (less than 20 seconds) suggests that appropriate decision making and deploying effective communication techniques were not uppermost on his mind.

[52] Thereafter at around 11:14 all four male officers stand and Person X remains lying face down on the floor, a mask still covering their face and their hands handcuffed behind their back. At 11:19 Person X appears to have their eyes closed and is breathing heavily as is apparent from the movement of Person X's stomach which is clearly visible because it is uncovered. At 11:35, the female officer appears to be attempting to move or roll Person X but is unsuccessful and at 12:05 the female officer begins removing the handcuffs while Person X lays motionless (apart from rapid breathing) on the floor. Efforts are made by several of the officers to arouse Person X, apparently to no avail and then Person X's limbs are manoeuvred so that Person X can be more comfortable and presumably lay in a safer position.

[53] From about 14:21 Person X appears to be breathing more rapidly and perhaps mildly convulsing but this stops quickly. Person X is left lying on the floor motionless save for breathing which is visible by the movement of Person X's stomach which is still visible and the occasional hand or finger movements. At approximately 16:05 Mr Varker moves towards Person X and lowers the facemask to Person X's chin, presumably to ensure that Person X's breathing is unimpeded. Thereafter Mr Varker and a female officer remain in the room and another officer appears standing in the doorway. At 18:02 Person X may be observed as twitching or perhaps mildly convulsing and Mr Varker moves in closer to examine Person X, he is followed by the female officer.

[54] Senior Sergeant Hargreaves gave evidence that after the bracelet had been removed and all officers released Person X, he observed on the footage that Person X was demonstrating the

symptoms of Positional Asphyxia Death (PAD) namely, a loss or reduced levels of consciousness; panic; prolonged resistance; and sudden tranquillity.⁷⁷ That is certainly one explanation for that which is observable on the footage. Another of course is that Person X is faking it. It is difficult to conclude one way or the other from the footage alone. Senior Sergeant Hargreaves said that none of the officers present checked to provide first aid and he doubts that an ambulance was called for the reasons stated - concerns as to Person X's "wellbeing given [Person X] was evidently drug affected".⁷⁸ Senior Sergeant Hargreaves said that he considered it is unlikely that Mr Varker contacted paramedics due to Person X evidently being drug affected and that the conduct of Mr Varker and other officers were likely the root cause of the physical and conscious state of Person X.⁷⁹ Senior Sergeant Hargreaves said that between 14:34-16:04 he does not observe any first aid being provided to Person X by Mr Varker or other staff and he contends that as each has a legal duty of care to provide first aid in this circumstance, Mr Varker as the senior officer should have provided or directed another employee to provide Person X with first aid. And that not doing so is a breach of duty of care for a person in custody, in that they failed to provide reasonable care for their skill set.⁸⁰

[55] There is here an impermissible leap in logic. The conclusion drawn by Senior Sergeant Hargreaves assumes Person X needed first aid. The footage is hopelessly inconclusive in that regard. For the most part Person X appears to be motionless and not responsive. But it cannot be said to any degree of reasonable probability that Person X was unconscious nor in need of any first aid. There is observable albeit subtle movement from Person X along with visible resistance during attempts to move or roll Person X, which is inconsistent with Person X being unconscious. Furthermore, none of the many officers who are coming in and out of the room during this period show any particular concern that Person X might be unconscious or otherwise injured. This is all consistent with Mr Varker's evidence that during this period Person X did not lose consciousness, was responsive shown by tensing and compliance with a direction to open their hand.⁸¹ Although the unresponsiveness exhibited by Person X during this time may be attributed to the treatment meted out to Person X and in that sense was caused by it, what cannot be shown by reference to the footage alone is whether the unresponsiveness is the result of a deliberate decision to act unresponsive made by Person X or the result of a state of unconsciousness caused by Mr Varker's treatment of Person X. Later from about 28:40, when ambulance officers attended to examine Person X, Person X is not taken for further examination in hospital as one might expect of a patient who has earlier been rendered unconscious. Although as Mr Varker contends that Person X was never unconscious it is also possible the ambulance officers were not concerned about an earlier unconscious state because no mention was made of it. In this regard and having regard to the other matters to which I have referred, Mr Varker must be given the benefit of the doubt.

[56] I should also indicate that it is apparent from the footage that Mr Varker and some of the other officers, were checking on and monitoring Person X, and it would appear, at least from the footage, that neither Mr Varker nor any other officer thought Person X required first aid. In this context, the contention by Victoria Police that the "application of force left [Person X] in a plainly vulnerable state (as evinced by the CCTV), [and] [Mr Varker] should have checked on [Person X's] welfare and rendered appropriate assistance"⁸² is rejected. The CCTV footage shows Mr Varker and others check Person X, lower the face mask and manoeuvre limbs for comfort and safety. Since one cannot from the CCTV footage alone conclude that Person X was unconscious or required any other assistance, one cannot conclude that the duty to render assistance (including first aid) was engaged much less breached as Victoria Police allege.⁸³ An

equally plausible explanation of the relevant CCTV footage is that, having resisted on the ground for several minutes while several officers wrestled Person X's arms to a position where hand cuffs could be applied, Person X ran out of steam, stopped resisting, rested on the floor while catching their breath, and feigned unconsciousness.

[57] From about 19:00 Person X begins moving lips as though speaking and thereafter opens their eyes and visibly becomes verbally animated and emotional. From about 20:00 Person X appears to be sitting on the floor, becomes very animated and a verbal argument appears to break out between Person X and Mr Varker, with Person X aggressively pointing their finger at Mr Varker although Mr Varker is standing, and Person X remains seated cross-legged. Another officer (a uniformed Sergeant) is in the room and appears to calm Person X down.

[58] At about 21:22 Person X stands up and moves aggressively towards Mr Varker. A uniformed Sergeant is intervening. Mr Varker appears to take a step towards Person X, and both appear to be remonstrating. Person X again moves aggressively towards Mr Varker and the uniformed Sergeant attempts to restrain Person X by manoeuvring the arms behind Person X's back at approximately 21:31. At the same time Mr Varker takes hold of Person X by the hair then by the throat with his right hand pushing Person X backwards towards the wall and then by the hair again. Other officers intervene and Mr Varker continues to hold Person X's hair while Person X appears to be resisting by jerking their head and body from side to side.

[59] I agree with Senior Sergeant Hargreaves' assessment that Mr Varker should have left the room to de-escalate the situation instead of continuing to remonstrate and apparently antagonising Person X,⁸⁴ which as the footage shows, his conduct is antagonising. As is evident from the footage there were sufficient resources available to deal with the situation and apart from the initial scuffle (commencing at about 21:31), which I consider reasonable because it was in self-defence and to gain control, the application of force by Mr Varker from about 21:37 (at which point the uniformed Sergeant and the female officer had control of Person X) until about 22:22 (when Mr Varker finally releases the hair of Person X) was not reasonable in the circumstances. Thereafter and until about 22:52 Mr Varker remained in the iFace room standing in a manner which has all the appearance of aggression and pointing 4 times towards Person X during which the two appear to argue. Mr Varker's mannerisms appear antagonistic, and he does not appear to be attempting any calming or de-escalation of the situation.

[60] Mr Varker gave evidence explaining the footage from about 21:33 as follows:

“I then moved my hand to the side of [Person X's] neck because [Person X] was turned to the side by members trying to restrain [Person X]. At around this time, I saw that [Person X] had also bitten [their] lip and spat blood on the wall. As [Person X] is recorded as being positive for Hepatitis C, I immediately registered this as an imminent health and safety hazard.”⁸⁵

[61] And later about the footage from 23:20 to 24:22:

“Sergeant Coffey cleaned the blood off [Person X's] lip, while he and PCO Bruce continued to speak with [Person X], with Sergeant Coffey appearing to make gestures that [Person X] should calm [themselves].”⁸⁶

[62] I do not accept this evidence. Firstly, there is no vision showing that Person X bit or was biting their lip much less showing that Person X spat on the wall. It is true that Sergeant Coffey cleaned Person X's lip with a tissue, as well as parts of the floor and the wall, but the specks of apparent blood which Sergeant Coffey is seen cleaning, are from the same area of the wall where earlier [between 21:46 and 22:10] as many as six officers are seen pressing Person X's body and head forcefully against that wall area. It is just as likely and probably much more likely that Person X's lip was cut at that stage or perhaps even earlier when forced to the floor.

[63] The remainder of the footage is uneventful. Ambulance officers arrive, examine Person X and then leave and Person X is taken from the iFace room. According to Mr Varker and not disputed, Person X is taken to an interview room and interviewed by the arresting police members.⁸⁷

[64] It is necessary now to say a few things about some aspects of Mr Varker's evidence. Mr Varker recalled that other persons present at the Geelong police station on 25 August 2020 were Senior Police Custody Officer Andrew Frame and Police Custody Officers David Feudoloff, Daniel Allison, Rochelle Bruce, and Gregory Henderson. Mr Varker says that he is aware that each officer was interviewed in relation to this matter and two of the interview records had been disclosed to him - PCOs Henderson and Feudoloff. He says the interviews corroborate what he sets out in his 9 June 2022 witness statement. He says that neither these officers, nor he, has been charged with any criminal offence relating to this matter and he attaches the transcripts of the interviews of PCOs Henderson and Feudoloff to his first witness statement.⁸⁸ The transcripts of the interviews are of limited probative value for several reasons. *First*, the record of interview is made in connection with a police investigation into whether either of Henderson's or Feudoloff's conduct in connection with the incident involving Person X was criminal conduct in the form of recklessly causing injury. The interview was not conducted for the purposes of investigating whether Mr Varker had engaged in misconduct in connection with his employment by reason of his conduct during the incident. *Second*, the statements recorded in the transcript were not given under oath or affirmation. *Third*, neither was subjected to cross-examination during the interview. *Fourth*, neither prepared any statement for these proceedings corroborating Mr Varker's version of events, nor were they called to give evidence before me where they could be subjected to cross-examination. *Fifth*, the fact that neither officer nor Mr Varker have been charged with any criminal offence relating to the incident is hardly material. Many species of misconduct in employment do not rise to the level of criminal conduct and here dismissal because Mr Varker engaged in criminal conduct is not alleged.

[65] That which is contended is that Mr Varker applied unreasonable force on several occasions to Person X on 25 August 2020. That he did so, having regard to that which is observable in the footage and for the reasons stated earlier, cannot seriously be disputed.

[66] Ultimately Mr Varker did not call any officer present during the incident to give evidence despite his earlier submission that he "considers that the testimony of former colleagues who were present at the Station on 25 August 2020, is relevant and [that he] intends to apply for Orders to Attend requiring them to attend the hearing of this application."⁸⁹

[67] I accept that Mr Varker's concerns earlier summarised about Person X's known prior behaviour and the likelihood of some recurrence of that behaviour forms part of that which ought to be considered in assessing the specific circumstances in which Mr Varker engaged in

the impugned conduct and I do so. Person X's past behaviour signalled a need for preparation, risk assessment and mitigation strategies. Chief among these would be effective and clear communication and the invocation of de-escalation strategies if Person X became agitated. Raising voices and threatening finger pointing at a person who is already visibly angered, upset and shouting obscenities is rarely appropriate, much less effective, particularly as here, when the preponderance of the physical resources is on Mr Varker's side. Person X was not in charge – Mr Varker was, but he failed to act with any leadership, much less any patience, insight or strategy – his behaviour was overbearing and thuggish. Contrary to Mr Varker's misconception, the prior behaviour and a fear or apprehension of a recurrence by Person X does not operate to permit Mr Varker to conduct himself inappropriately with impunity. It does not render conduct that is objectively inappropriate or unreasonable, as appropriate, or reasonable. In this regard I agree entirely with Victoria Police in submitting that the fact a person in custody may have acted inappropriately on previous occasions, does not absolve Mr Varker of his responsibilities to behave appropriately and treat that person in custody with dignity and respect. Put more plainly it does not in my view justify the violent behaviour of Mr Varker towards Person X evident in the CCTV footage of the incident on 25 August 2020.

[68] The better and circumstantially appropriate response is summarised in the evidence of Senior Sergeant Hargreaves (which I accept). He said, amongst other things:

“Based on the totality of the situation, when we talk about how Person X presented, [their] compliance, the immediate risk, the use of the resources, compliance with training, the operational response principles, the application of force. There's a myriad of factors that come into play. The use of the force in this circumstance was disproportionate to what was required.

...”

[69] The Senior Sergeant then went further in re-examination:

“I would have expected, considering Person X is a vulnerable person - and based on the information that's been provided today, reaffirms the need for effective communication, clear communication, and more suitable tactical options such as physical presence, communication and resources in the circumstances.”⁹⁰

[70] Any person in a position of power and with overwhelming resources can control another person by deploying forceful means. But the authority to exercise power over another – as Mr Varker doubtless had in relation to Person X - comes with the responsibility of recognising when force is reasonable or appropriate and when it is not. And in the face of abuse, agitation and disrespect I accept that it is tempting to react with force – but a mastery of self-control and restraint is required, and it is evident that on 25 August 2020 that Mr Varker exhibited none. All the more surprising of a person qualified in many martial arts systems, since the basic tenants of most such systems include teaching patience and self-discipline.

[71] I am therefore satisfied that Mr Varker used unreasonable force against Person X in the iFace room on 25 August 2020. However, for the reasons stated, the allegation that Mr Varker failed to render assistance to Person X in the iFace room on 25 August 2020 is not made out.

Face covering worn by Varker on 25 August 2020 – Allegation 3

[72] Victoria police contends that by wearing an inappropriate face covering while carrying out his duties Mr Varker engaged in misconduct. The face covering was akin to a half skull mask neck gaiter similar to the one shown below:



[73] Senior Sergeant Hargreaves' evidence was that “[t]he wearing of the gaiter “death mask” does not align with organisational values and behaviours, specifically respect and professionalism at Victoria Police. To wear it is against Victoria Police policy as it is not approved by the Uniform, Appearance and Equipment Committee. Further, it is not suitable as a OH&S mask to stop COVID infection or transmission. In light of the above, [he] consider[s] that the mask to be used for intimidation purposes only.”⁹¹

[74] There is no dispute that Mr Varker wore the impugned face covering during his interaction with Person X. It is clearly visible in the footage, and from the perspective as someone who does not know Mr Varker or the other male officers shown on the footage, it is often the main distinguishing feature as between Mr Varker and the other male officers who are all wearing disposable surgical masks.

[75] There is also no dispute that on 21 July 2020 an email was sent to all Victoria Police employees.⁹² The email relevantly provided:

“Employees in public-facing roles must wear a Victoria Police-issued mask (surgical mask) at all times (re-useable masks are not to be used).

Where there is public contact and physical distancing cannot be maintained, employees must wear full PPE, including disposable single-use gloves, safety glasses and surgical masks (re-useable masks are not to be used).

Employees who do not work in public-facing roles can wear either a disposable (surgical) mask or a reusable face covering. Reusable face coverings must comply with the CHO’s directions and be plain in design.”

[76] Mr Varker's evidence was that he had three cloth face coverings, which he rotated. One had an Australian flag, one had a Tour de France logo, and the third was the impugned face covering.⁹³

[77] Mr Varker also gave the following evidence:

Do you accept that you were required to comply with the direction issued to you on 21 July 2020? -No.

Okay. If I could take you to that direction? If I can get you to go, please - now I think his might be on Volume 3 so there's a little bit of moving around here. If I can get you to go to Volume 3 of the court book and go to court book page 1511? So 1511 which is exhibit MI3? -Yes.

That there is a copy of the relevant direction? -Who from?

That is a direction that was issued to all Victoria Police employees including you in respect of the compulsory wearing of face coverings? -Yes. That was anyone who was in the public face. Our custody is not a public face. It's a sterile part of the department and even sworn police are not allowed in there. So there's no members of the public allowed so we weren't in the public face at the time.

Well, I'd suggest to you that you were in fact required to comply with this direction because you were interacting and facing the members of the public and the video footage

--? -No. We weren't.

-- shows that all of your officers were, in fact, complying with the direction by wearing surgical masks? -Well, the ones you saw but they weren't all complying and we didn't have medical masks. They didn't have any in stock. So a lot of those members there were buying their own and probably wearing them for three or four days on end which was wrong.

...

And it's even more important that you comply with all relevant directions, policies and procedures to set a good example? -Yes. And I did.

And you, also, in your role come into contact with members of the public, namely the detainees in your cells? -Yes.

So, in those terms, it is a public facing role because you have contact with members of the public? -I disagree with you. It's a sterile environment. And it only has access to certain people and not members of the public – the general public.⁹⁴

[78] Mr Varker's suggestion that he did not need to comply with the direction in the email because he was not in a public facing role is frankly absurd. A person in custody at the Geelong police station does not cease to be a member of the public merely because the person is in custody. Any officer dealing with a person in custody has a public facing role. Mr Varker was no exception and his attempted distinction – that general members of the public cannot access

the area in which Person X was being held, therefore public facing means general public access – serves his credit no good.

[79] But his arid defence does him no good in any event. Even if I were to accept that his role was not public facing – which I do not – the impugned face covering still does not comply. As the extracted text from the 21 July 2020 email above makes clear, although employees who do not work in public facing roles were permitted to wear a reusable face covering, such covering must, *inter alia*, “be plain in design”.⁹⁵ Even on a generous view, the impugned face covering worn by Mr Varker did not comply.

[80] I should note for completeness that Mr Varker’s submission that he could not “wear a medical mask for an extended period of time due to a respiratory condition”⁹⁶ as a basis for concluding that the wearing of the impugned mask was not inappropriate is rejected for the following reasons. *First*, there is no medical evidence to support that submission. *Second*, he does not say the condition was persisting at the time of the incident. *Third*, there is no explanation why a surgical mask would affect his respiratory condition, but the impugned face covering would not – and to be frank I doubt a plausible scientific explanation can be found.

[81] A final point should also be made about the impugned face covering. The VPM Uniform Standards (with which Mr Varker was required to comply),⁹⁷ require employees to ensure that decisions about the wearing of uniforms are “consistent with the overarching policy for uniform and appearance”; and maintain a “professional image of Victoria Police”.⁹⁸ The VPM Uniform Standards also provides that when on duty an employee’s individual style does not have precedence over the organisation’s responsibility to provide a consistent and professional image and a safe workplace. The choice of face covering which was tailored to his personal taste did not project a professional image nor was it conducive to fostering a safe workplace. The wearing of the impugned face covering was inconsistent with the VPM Uniform Standards.

[82] I am satisfied that Mr Varker’s role was a public facing role. I am also satisfied that the direction set out in the email to all employees of Victoria Police on 21 July 2020 applied to him and that he was required to comply. By wearing the impugned face covering shown on the footage of his dealings with Person X, Mr Varker did not comply with the direction. It was also inconsistent with the VPM Uniform Standards, with which Mr Varker was required to comply. There was no controversy about whether the direction in the email was reasonable or lawful, and in my view, it was plainly a lawful and reasonable direction. By not complying with the direction and the VPM Uniform Standards, Mr Varker misconducted himself. And as already noted, even on his view about whether his role was public facing, the impugned face covering worn by him did not comply with the direction. That said, by itself the misconduct was not particularly serious. I do not accept that Mr Varker wore the impugned face covering with the specific intention of intimidating Person X. The misconduct in my view warranted no more than some counselling during which the face covering requirements and the VPM Uniform Standards would be explained and reinforced. By itself the conduct does not rise to the level of valid reason for dismissal.

23 June 2020 incident involving Person Y – Allegation 4

[83] This incident is captured on 4 minutes of CCTV footage in a cell at Geelong Police Station on 23 June 2020, which I have reviewed. Person Y is lying on a bed initially covered by a white blanket. Two custody officers including Mr Varker enter the cell, appear to speak

with Person Y who remains covered by the blanket. One officer (not Mr Varker) removes the blanket and a third appears in the doorway. Mr Varker appears to speak (perhaps even forcefully) to Person Y and then reaches towards the head area of Person Y and Person Y swings their right arm and fist towards Mr Varker and appears to strike Mr Varker twice in the head region. Mr Varker and the second officer appear to be attempting to restrain Person Y. Two further officers enter the room. One assists in restraining Person Y, while the other stands behind the officers, ready to render assistance, but for the most part is positioned in a way that makes it very difficult to see what Mr Varker is doing. I make no finding whether the officer stood in the position he did to deliberately obstruct the camera view – he was not called to give evidence and I simply cannot know – but that was the effect of his position in the cell. Up to 4 other officers (including at least one uniformed officer) mill outside the cell. At around 3:35 Person Y is lifted from the bed, hands restrained behind Person Y's back and is escorted out of the cell. Mr Varker has hold of Person Y's hair by the grip of Mr Varker's left hand while his right hand is on Person Y's collar region.

[84] Senior Sergeant Hargreaves gave evidence that although he was not aware of the surrounding circumstances regarding the events captured on the CCTV footage, on his review of it he considers that it was inappropriate for Mr Varker to initiate conflict with Person Y, because:

- Person Y was secured within a controlled environment (a gaol facility);
- several officers including a uniformed officer were in close proximity and were available to support a peaceful resolution in the situation;
- Person Y was lying down on a bed with arms folded and legs crossed; and
- Person Y did not display any visual provocation and there was no imperative to act that can be observed i.e. self-harm.⁹⁹

[85] Senior Sergeant Hargreaves says that the force used and unsanctioned techniques employed were disproportionate to any objective which was implied or required.¹⁰⁰ He also sets out his views about what the CCTV footage shows. For example, he says that at about 1:29 of the footage he observes Mr Varker's right hand move rearwards, fist clenched and then delivering a striking type motion "in the vicinity of" Person Y's head, and later at 2:24 that "Mr Varker appears to have" his right knee placed in the vicinity of Person Y's head or shoulder.¹⁰¹

[86] Respectfully, this is speculative. From the CCTV footage, one cannot readily see Person Y's head when the three officers are restraining Person Y much less see any contact with his head, by fist, knee or otherwise. The fact of the matter is that much of the vision so far as Mr Varker's conduct is concerned is obscured by the body position of another officer. Speculation about where a knee might be or where a swinging arm might land is not proof, to the requisite standard, of the fact asserted.

[87] Mr Varker gave evidence that Person Y had been directed to move cells.¹⁰² He said that Person Y lashed out at him, punching him in the mouth twice, and cutting Mr Varker's lower lip.¹⁰³ The punches twice made by Person Y are clearly visible on the footage. Mr Varker said that Person Y grabbed his throat, and ripped Mr Varker's shirt,¹⁰⁴ and that Person Y ripped Mr Varker's earpiece in two.¹⁰⁵ Mr Varker said that Person Y was subsequently subdued by him and other officers, was ultimately compliant with the direction to move cells and was secured.

Person Y was subsequently charged with assaulting Mr Varker on this occasion.¹⁰⁶ I accept this evidence.

[88] Apart from that which follows below, I do not consider that the CCTV footage establishes that Mr Varker used unreasonable force on Person Y in the circumstances. I also do not accept, as Senior Sergeant Hargreaves seems to suggest that Mr Varker was not justified “to initiate conflict with Person Y”. Person Y needed to be moved to another cell and appears in the CCTV footage unwilling to co-operate. Moving in, as Mr Varker did, to hurry Person Y along, seems to me to be justified, as was the restraint of Person Y following the assault upon Mr Varker.

[89] However, much like Senior Sergeant Hargreaves, I am not persuaded that there was any reason nor need to grab Person Y by the hair as Mr Varker did. Mr Varker’s contention to the contrary¹⁰⁷ is not accepted. Person Y was by this stage restrained and under control and the hair hold and grabbing visible at the end of the footage from about 3:36 was excessive, unnecessary and in my view an unreasonable use of force in the circumstances. By itself however, and considering the circumstances, I do not consider it warranted more than a warning and some retraining.

Inappropriate Facebook posts – Allegation 5

[90] Facebook posts the subject of this allegation appear on Mr Varker’s personal Facebook page under the pseudonym ‘Mick Vee’ and is (or was) accessible through the URL “<http://www.facebook.com/mick.varker>”.¹⁰⁸ There is no dispute that this was Mr Varker’s Facebook page or that the posts the subject of the allegations appeared there and were made during the course of his employment. I do not propose to detail the impugned posts here. It is sufficient to note that some of the posts are vile and racist - they are inappropriate. The kind of discourse in which Mr Varker engages or endorses by reposting some of the posts should be condemned. I suggest that even to some who would otherwise rail against political correctness, ‘wokeness’ and virtue signalling, would find some of the opinions expressed in the posts confronting. But that is not the issue here.

[91] The VPM – Guidelines – Social Media and Online Engagement applied to Mr Varker and relevantly sets out the following behavioural standards and expectations of employees when using social media in a personal capacity, as follows:

“... employees are to apply the following when using social media in a personal capacity:

- Adhere to the Terms and Conditions of the relevant social media platform/website and any other applicable laws, including copyright, privacy, defamation, contempt of court, discrimination and harassment.
- Do not make any comment about the administration of any Government department (s.95(1)(a), Constitution Act).
- Do not post information that could be perceived as an official Victoria Police comment; see section 2.2 regarding making official comment.

- Do not use or disclose Victoria Police information; see VPMP Appropriate use of information. Employees are reminded of the provisions of s.227 and 228, Victoria Police Act 2013 regarding the unauthorised disclosure of information.
- If posting material that is not restricted by s. 95, Constitution Act and identifying themselves as a Government employee:
 - expressly state on all postings that the stated views are their own and not those of Victoria Police or the Government
 - only discuss publicly available information
 - ensure the posted material is accurate, not misleading
- Do not post or endorse any obscene, violent, discriminatory, vilifying, defamatory, offensive, insulting, threatening, harassing words, images or sounds.
- Do not use Victoria Police email addresses or any Victoria Police logos.
- Do not use the identity or likeness of another Victoria Police employee without their permission.
- Do not publish material that might otherwise cause damage to Victoria Police's reputation or bring it in to disrepute.¹⁰⁹

[92] The Code applied to Mr Varker and relevantly provides at clause 3.5:

“When making a comment in a private capacity, public sector employees of special bodies ensure their comments are not related to any government activity that they are involved in or connected with as a public sector employee and make it clear they are expressing their own view. They ensure personal comments do not compromise their capacity to perform their public sector role in an unbiased manner, and that their comments are not seen or perceived to be an official comment.”

[93] Clause 3.9 provides that:

“Public sector employees of special bodies seek to build and maintain a high level of trust with the Government, community and other public sector employees. In the performance of their public duties and in their private life, public sector employees of special bodies avoid conduct that may adversely affect their standing as a public official, or which may bring their public sector employer or the public sector into disrepute.”

[94] Despite the views expressed in the evidence of Niki Howells-Schramm, Victoria Police's Director, Business Partnering and Workplace Relations Division, Human Resources Command,¹¹⁰ I do not consider the posts to be contrary to the guidelines or the code of conduct. The links between the comments made and the suggestion that the comments:

- cause damage to Victoria Police's reputation or bring it in to disrepute; or
- relate to a government activity in which he is involved or connected with as a public sector employee,

which Ms Howells-Schramm seeks to make are too remote. None of the comments criticise Victoria Police and Mr Varker is not identified as an employee of Victoria Police. Such comments as involve the police are supportive of police. The old photograph of Mr Varker in a

police uniform with the then Prime Minister John Howard is too remote, as is the notation in one of the posts that he works in a gaol. The uniform in the photograph is plainly not current. It is to be remembered that Mr Varker was last a member of Victoria Police in around 1996 and the pale blue shirt uniform worn by Mr Varker in the photograph has not been part of the Victoria Police uniforms for many years. Persons employed in Victorian gaols might be employees of private sector companies contracted to run or staff gaols rather than of Victoria Police or the State of Victoria. Nothing else identifies Mr Varker as an employee of Victoria Police.

[95] Comments such as “Daniel Andrews and Scomo you have to sack these 2 insubordinate members of your parliaments” are not comments relating to a government activity nor the administration of a department, much less one with which Mr Varker is connected.

[96] Moreover, I do not accept that in making comments on his Facebook page Mr Varker does not make it clear he is expressing his own views. Mr Varker might rightly be called out for parroting well-worn and tiresome stereotypes about Sudanese youth or first nations people in custody, but the views could on no account be mistaken as official Victoria Police or Victorian Government views. They are unmistakably the ignorant and racist views which he holds but which he lacks the insight and emotional intelligence to not express.

[97] In the end, while I find the comments in some of the posts distasteful, narrow minded, sometimes racist and sometimes abhorrent, the posts were made on personal time, in a personal space and I agree with Mr Varker’s submission that he is not easily identified (save perhaps by his Facebook “friends”), he does not use his own name, and the Facebook page makes no reference to Mr Varker being employed by Victoria Police.

[98] Although I do not condone the comments in the posts, for the reasons set out above I do not consider that Allegation 5 has been made out.

[99] Having regard to my findings set out above I turn next to consider whether Mr Varker’s dismissal was unfair.

Whether dismissal was unfair

Protection from unfair dismissal

[100] An unfair dismissal remedy in the form of an order for reinstatement or compensation may only be made if I am satisfied Mr Varker was, at the date of the dismissal, protected from unfair dismissal under the Act and that the dismissal was unfair. Section 382 of the Act sets out the circumstances that must exist for the applicant to be protected from unfair dismissal and there is no dispute, and I am satisfied, that he was, on 15 February 2021, protected from unfair dismissal within the meaning of s 382. Mr Varker’s dismissal will have been unfair if, on the evidence, I am satisfied that all of the circumstances set out in s 385 of the Act existed. There is also no dispute that Mr Varker was dismissed at the initiative of Victoria Police within the meaning of s 386(1)(a). Victoria Police is not a small business employer, so the Small Business Fair Dismissal Code is not engaged, and the dismissal was not a case of genuine redundancy within the meaning of s 389.

Harsh, unjust or unreasonable

[101] A consideration whether a dismissal was harsh, unjust or unreasonable, requires the following matters in s 387 of the Act be taken into account:

- (a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees);
- (b) whether the person was notified of that reason;
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal;
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal;
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal;
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal;
- (h) any other matters that the FWC considers relevant.”

[102] A statutory requirement that a matter be taken into account means that the matter is a ‘relevant consideration’ and is a matter which the decision maker is bound to take into account.¹¹¹ To take into account the matters set out in s 387 means that each of the matters must be treated as a matter of significance in the decision-making process¹¹² and requires the decision maker to evaluate it and give it due weight, having regard to all other relevant factors.¹¹³ In weighing relevant matters, the weight given to a particular matter is ultimately a matter for the Commission subject to some qualifications, which for example might lead a court to set aside a decision if the decision maker has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance.¹¹⁴

[103] The phrase “harsh, unjust or unreasonable”, finds no definition in the Act, but a dismissal may be harsh but not unjust or unreasonable; it may be unjust but not harsh or unreasonable; or may be unreasonable but not harsh or unjust. There will be cases where these concepts will overlap. In any given case all the concepts may be present, or only some, or none. A dismissal may be unjust because the employee was not guilty of the misconduct on which the employer acted. It may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer. And may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.¹¹⁵ But the assessment of whether any or all of these concepts is present in a given case of dismissal is undertaken in a statutory context and it is the matters set out in s 387 of the Act to which regard must be had in assessing whether a particular dismissal was harsh, unjust or unreasonable.

Valid reason – s 387(a)

[104] The essence of a valid reason is that the reason is a sound, defensible or a well-founded reason – one that is not capricious, fanciful, spiteful or prejudiced.¹¹⁶ The issue is whether there was such a valid reason related to Mr Varker’s capacity or conduct. Whether conduct which is

said to found a valid reason occurred is to be determined based on the evidence in the proceedings assessed on the balance of probabilities taking into account the gravity or seriousness of the allegations.¹¹⁷ The existence of a valid reason is not ascertained by asking whether the employer, after a sufficient investigation, had a reasonably held belief that the conduct occurred.¹¹⁸ A reason would be valid because the conduct occurred, and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination.¹¹⁹ It is not necessary to show the misconduct as sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).¹²⁰ An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) may also be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.¹²¹

[105] Victoria Police says there are five separate species or allegations of misconduct on which it relies to establish a valid reason for Mr Varker's dismissal, namely:

- (a) the unreasonable use of force against Person X in the cells on 25 August 2020;
- (b) the failure to render assistance to Person X in the cells on 25 August 2020;
- (c) the wearing of an inappropriate face covering in the cells on 25 August 2020;
- (d) the unreasonable use of force against Person Y in the cells on 23 June 2020; and
- (e) the inappropriate Facebook posts.

[106] Mr Varker says that none of the matters on which Victoria Police relies, whether taken alone or together, constitute a valid reason for dismissal.

[107] For the reasons set out in [36]-[51] and [58]-[62] I am satisfied that Mr Varker used unreasonable force against Person X in the iFace room on 25 August 2020. The conduct in which I have found he engaged was contrary to standards of conduct that applied to his employment and was sufficiently serious to justify his summary dismissal and plainly founded a valid reason for dismissal.

[108] However, for the reasons stated at [52]-[56] the allegation that Mr Varker failed to render assistance to Person X in the iFace room on 25 August 2020 is not made out. In the circumstances there was no misconduct as alleged and so no valid reason on this basis. The same conclusion is reached in respect of the inappropriate Facebook posts allegations for the reasons set out at [89]-[97].

[109] For the reasons explained at [72]-[82], by wearing the impugned face covering shown on the footage of his dealings with Person X, Mr Varker did not comply with a direction in the email dated 21 July 2020 concerning the wearing of masks. Wearing the impugned face covering was also inconsistent with the VPM Uniform Standards, with which Mr Varker was required to comply. However, as the misconduct in my view warranted no more than some counselling during which the face covering requirements and the VPM Uniform Standards would be explained and reinforced I do not consider that this conduct rises to the level of a valid reason for dismissal. Nor do I consider that it adds to the veracity of the valid reason already found. That reason is self-evidently capable of standing alone.

[110] Save for Mr Varker's conduct grabbing Person Y by the hair during the incident on 23 June 2020 which I consider was excessive, unnecessary and an unreasonable use of force in the circumstances, for the reasons set out at [83]-[89] the evidence does not otherwise establish that Mr Varker engaged in any other misconduct during the incident. As I have already indicated, by itself, and considering the circumstances I do not consider the misconduct in which Mr Varker engaged on that occasion warranted more than a warning and some retraining.

[111] In the circumstances it is not necessary for me to deal with whether the conduct said to have been discovered after the dismissal can be relied on to justify the dismissal.

[112] That there was a valid reason for Mr Varker's dismissal weighs against a conclusion that his dismissal was unfair.

Notification of the reason for dismissal and opportunity to respond – s 387(b) – (c)

[113] Notification of a valid reason for termination should be given to an employee protected from unfair dismissal before the decision is made,¹²² in explicit terms,¹²³ and in plain and clear terms.¹²⁴ This is an element which may be described as procedural fairness in order that an employee may respond to the reason. Procedural fairness requires that an employee be notified of the reason for the dismissal before any decision is taken to terminate employment to provide them with an opportunity to respond to the reason identified. Section 387(b) and (c) would have little practical effect if it were sufficient to notify an employee and give them an opportunity to respond after a decision had been taken to terminate employment.¹²⁵ An employee protected from unfair dismissal should also be given an opportunity to respond to any reason for dismissal relating to the employee's conduct or capacity.

[114] Mr Varker accepts that he was notified of the reason, which I have found to be a valid reason (Allegation 1), for his dismissal and that he was provided with an opportunity to respond to it.¹²⁶ In the circumstances of my findings, that he was not afforded the same notice and opportunity in respect of Allegations 4 and 5 is moot. In the circumstances, these matters weigh against a conclusion that the applicant's dismissal was unfair.

Any unreasonable refusal by the employer to allow the person to have a support person – s 387(d)

[115] This consideration is concerned with whether there was any unreasonable refusal by the respondent to allow the applicant to have a support person present to assist at any discussions relating to the dismissal. There is no suggestion that there was any refusal. There was no termination meeting at which Mr Varker was given the opportunity to bring a support person. Nevertheless, it is clear from the correspondence during the investigation and leading to the dismissal that throughout the process, Mr Varker was represented by his union. Accordingly, this matter weighs neutrally.

Warnings regarding unsatisfactory performance – s 387(e)

[116] Mr Varker's dismissal was not related to any unsatisfactory performance and so this consideration does not arise. The dismissal was for misconduct.

Impact of the size of the respondent on the procedure followed – s 387(f)

[117] The consideration in s 387(f) of the Act is concerned with the likely impact of the size of an employer’s enterprise on the procedures followed by the employer. Victoria Police is a large and well-resourced employer. Its size and available resources meant that it had the capacity to obtain advice about the procedure that it adopted. But there is no evidence nor any suggestion that its size negatively impacted the procedure it adopted to effect Mr Varker’s dismissal. This consideration weighs neutrally.

Absence of dedicated human resources management specialist/expertise on procedures followed – s 387(g)

[118] This consideration is concerned with “the degree to which the absence of dedicated human resources management specialists or expertise” would be likely to have impacted on the procedure it adopted to effect Mr Varker’s dismissal. There is no evidence that there was an absence of any dedicated human resources management specialists or expertise” much less that such an absence had any material impact on the procedure Victoria Police adopted to effect Mr Varker’s dismissal. The consideration does not arise.

Any other matters that the Commission considers relevant – s 387(h)

[119] Mr Varker contended that dismissal was disproportionate in the circumstances - the punishment did not fit the crime. He says that if he has used excessive force, then in the circumstances a reprimand or warning, together with the prospective availability of further training, would have been a more appropriate response. This is true in relation to the incident involving Person Y, but the submission is otherwise way off the mark. To be clear, the force he used on Person X was violent and excessive. Yanking Person X’s hair, dragging Person X across the floor by the hair, holding and pulling the hair with both hands, and placing a knee across the head and neck area of Person X in the circumstances depicted in the CCTV footage was not justified. Mr Varker did not just marginally step over the line – his conduct was objectively way out of bounds. It was not acceptable and cannot be justified simply because Person X was being difficult, abusive and non-compliant.

[120] Mr Varker also contends that the harshness of the dismissal is also emphasised by reference to Mr Varker’s own circumstances. He has been employed in policing for virtually his whole working life. He has an otherwise unblemished career and at 66 years of age, his prospects of employment in any alternative role would be slim - particularly given the black mark of termination of employment for serious misconduct. Mr Varker says that the profound impact of dismissal on him should have resulted in Victoria Police deciding against dismissal in the circumstances. It is accepted that all of these matters (save for the last matter), which are not otherwise contested, weigh in the balance in favour of finding the dismissal unfair. But sight must never be lost of the serious nature of the conduct in which Mr Varker has been found to have engaged. It warrants condemnation given the position he occupied, and it warranted dismissal notwithstanding his age, service and otherwise good record.

[121] The preponderance of relevant matters which I am required to take into account favour a conclusion that the dismissal was not unfair. Such matters that go the other way are of insufficient weight to tip the balance in Mr Varker’s favour.

Conclusion

[122] There was a valid reason for the dismissal related to Mr Varker's conduct. There was no substantive procedural unfairness involved in the way the dismissal was effected and none of the matters raised by Mr Varker tip the balance towards unfairness in the dismissal. The other mandatory considerations either weigh neutrally or do not arise. In these circumstances I am not persuaded that the dismissal was harsh, unjust or unreasonable. Mr Varker's dismissal was not unfair and his application for an unfair dismissal remedy will therefore be dismissed.

Order

[123] I order that the application by Michael Varker in U2021/1816 for an unfair dismissal remedy be dismissed.



DEPUTY PRESIDENT

Appearances:

R Millar for Michael Varker

M Minucci for Victoria Police

Hearing details:

Thursday 22 and Friday 23 December 2022
Melbourne

Final written submissions:

Mr Michael Varker: 18 January 2023

Victoria Police: 31 January 2023

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¹ Tribunal Book (TB)8 at [1]

² [\[2021\] FWC 2732](#)

³ Ibid at [2]

⁴ TB111-112

⁵ TB113-118

⁶ TB1472 at [30]

⁷ TB1472-1473 at [31]-[41]; TB2509-2520

⁸ TB2490-2506

⁹ TB1472 at [29]

¹⁰ TB1472 at [32]; TB2522-2561; Particular (g) to the first allegation was not substantiated, see TB2548, TB2566, TB2578

¹¹ TB1474 at [44]; TB2574-2580

¹² TB2574-2580

¹³ TB1475 at [47]-[29];TB2582-2585

¹⁴ TB2587-2590

¹⁵ Ibid

¹⁶ TB2596-2507

¹⁷ *Varker v Victoria Police* [\[2021\] FWC 2732](#) at [11]-[31]

¹⁸ TB787-788 at [13]-[15]

¹⁹ TB860 at [7], TB 1339, Transcript PN239-PN243

²⁰ TB1243

²¹ TB2 at [10]

²² TB3 at [12]

²³ TB2 at [11(a)]; Applicant's closing submissions at [8]

²⁴ TB 2 at [11(b)]; Applicant's closing submissions at [8]

²⁵ Applicant's closing submissions at [10]

²⁶ Exhibit 9

²⁷ [PR749227](#)

²⁸ TB9 at [7]

²⁹ TB10 at [8]

³⁰ TB10 at [9]-[10]

³¹ TB193 at [3]

³² TB194 at [5]

³³ TB195-199 at [11]-[29]

³⁴ TB198 at [22]

³⁵ TB199-201 at [30]-[33]

³⁶ TB201 at [34]; TB604-726

³⁷ TB201 at [35]

³⁸ Ibid at [36]

³⁹ Ibid; TB728-748

⁴⁰ TB611

⁴¹ TB611, TB222

⁴² TB224

⁴³ TB225, TB613

⁴⁴ TB613, TB228-229

⁴⁵ Transcript PN326-PN327

⁴⁶ Transcript PN327

⁴⁷ Transcript PN336-PN337

⁴⁸ TB153 at [6]

⁴⁹ Transcript PN354-PN364

⁵⁰ Transcript PN261-PN296

⁵¹ TB153-154

⁵² TB222

⁵³ Ibid

⁵⁴ TB611

⁵⁵ Transcript PN253-PN260

⁵⁶ TB153-154

⁵⁷ For example at Transcript PN289 – PN291; PN313 – PN316; PN342 – PN344; PN550 – PN555; PN561 – PN563; PN626 – PN629; PN656 – PN661; PN725 – PN731; PN778 – PN779; PN943 – PN946; PN1001 – PN1002; PN 1009 – PN1010

⁵⁸ TB281, TB285, TB674 and TB678

⁵⁹ TB153 at [6]

⁶⁰ TB204

⁶¹ Ibid

⁶² Ibid

⁶³ TB18

⁶⁴ TB204

⁶⁵ TB18

⁶⁶ Ibid

⁶⁷ TB183

⁶⁸ TB19

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ TB20

⁷² Ibid

⁷³ TB208

⁷⁴ TB207-208

⁷⁵ TB21

⁷⁶ TB20

⁷⁷ TB210

⁷⁸ TB210; TB22

⁷⁹ TB210

⁸⁰ TB201-211

⁸¹ TB22

⁸² TB189 at [41]

⁸³ Ibid

⁸⁴ TB212

⁸⁵ TB25

⁸⁶ TB26

⁸⁷ TB27

⁸⁸ TB13, TB33-110

⁸⁹ TB6 at [28]

⁹⁰ Transcript PN1894, PN1901

⁹¹ TB215 at [52]

⁹² TB1511

⁹³ Transcript PN 1101, PN1104

⁹⁴ Transcript PN310-PN324

⁹⁵ TB1511

⁹⁶ TB5 at [27(c)]

⁹⁷ Transcript PN247

⁹⁸ TB1489-1509

⁹⁹ TB1457 at [8]-[9]

¹⁰⁰ TB1457 at [8]

¹⁰¹ TB1456

¹⁰² TB164-165; Transcript PN 1093

¹⁰³ TB166

¹⁰⁴ *Ibid*

¹⁰⁵ Transcript PN 1077

¹⁰⁶ TB168

¹⁰⁷ TB168-169 at [16]

¹⁰⁸ TB1416-1453

¹⁰⁹ TB1352-1353

¹¹⁰ TB864-868 [23]-[42]

¹¹¹ *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* [1986] HCA 40, (1986) 162 CLR 24; see also *Griffiths v The Queen* (1989) 167 CLR 372 at 379; *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [23]-[26] and cited in *Hasim v Attorney-General of the Commonwealth* [2013] FCA 1433, (2013) 218 FCR 25 at [65]

¹¹² *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836 and *National Retail Association v Fair Work Commission* [2014] FCAFC 118

¹¹³ *Nestle Australia Ltd v Federal Commissioner of Taxation* (1987) 16 FCR 167 at 184

¹¹⁴ *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* [1986] HCA 40, (1986) 162 CLR 24 at [15]

¹¹⁵ *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at 465

¹¹⁶ *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333, (1995) 62 IR 371 at 373

¹¹⁷ *Briginshaw v Briginshaw* [1938] 60 CLR 336

¹¹⁸ *King v Freshmore (Vic) Pty Ltd* Print S4213 at [23]-[24]

¹¹⁹ *Sydney Trains v Gary Hilder* [\[2020\] FWCFB 1373](#) at [26]

¹²⁰ *Ibid*

¹²¹ *Ibid*

¹²² *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41]

¹²³ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [150]-[151]

¹²⁴ *Previsic v Australian Quarantine Inspection Services* Print Q3730

¹²⁵ See also *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151 which was dealing with the corresponding provisions in s 170CG(3)(b) and (c) of the Workplace Relations Act 199

¹²⁶ Applicant's closing submissions at [45]-[46]